

The record consists of the transcript of the August 4, 2011, post-award hearing and exhibits thereto; the transcript of the November 23, 2010, settlement hearing and attachments thereto, together with the pleadings contained in the administrative file.

ISSUES

Claimant settled his claim on November 23, 2010, leaving only medical treatment open. In June 2011, claimant filed an Application for Post Award Medical and an Application for Review and Modification. Claimant requested additional medical treatment and temporary total disability (TTD) benefits.

On August 4, 2011, a post-award hearing was held. On August 5, 2011, the ALJ issued an Order Referring Claimant for Independent Medical Evaluation, which ordered Dr. Terrence Pratt to perform an independent medical examination to determine what medical treatment was necessary to cure and relieve the effects of claimant's injury. On the same date, a separate Order for Compensation was issued by the ALJ, granting claimant TTD benefits from August 4, 2011, until Dr. Pratt's IME report was received.

On September 7, 2011, respondent's counsel filed a Motion to Reconsider the issue of TTD. Without holding a hearing the ALJ issued an Order on September 13, 2011, reversing himself and denying claimant's request for TTD benefits. The ALJ issued the September 13, 2011, Order prior to receiving a response from claimant. On September 27, 2011, claimant appealed the ALJ's September 13, 2011, Order.

1. Does the Board have jurisdiction to hear this matter? Respondent did not appeal the August 5, 2011, Order for Compensation to the Board. Instead respondent filed its Motion to Reconsider on September 7, 2011. Without requesting or receiving a response from claimant to respondent's Motion to Reconsider, or holding a hearing on the motion, the ALJ granted respondent's Motion to Reconsider. Thus, it is up to the Board to determine if a motion to reconsider an issue previously decided by an administrative law judge is permitted by the Kansas Workers Compensation Act, Chapter 51 of the Kansas Administrative Regulations, or case law. If so, did respondent timely file its motion to reconsider?

2. If the Board does have jurisdiction over this claim, does the settlement by the parties preclude claimant from seeking and receiving TTD benefits?

FINDINGS OF FACT

The Board has not received a brief from either claimant or respondent. After reviewing the record, the Board finds:

Claimant's original accident occurred on February 23, 2010. He suffered bilateral upper extremity injuries, ulnar nerve damage, elbow injuries and possible tears in the left abdomen.¹ On November 23, 2010, claimant settled his claim for a "... lump sum today

¹ P.A.H. Trans. at 7.

in the amount of \$10,967.60 and is to be in strict compromise of all the issues, except open medical.”² At the settlement hearing, claimant was represented by counsel. The Special Administrative Law Judge (SALJ) asked claimant if he had read the medical reports and discussed them with his attorney. The SALJ did not inquire if claimant read the worksheet for settlement, nor did he inquire whether claimant discussed the terms of the settlement with his attorney. The SALJ found the settlement was in the best interest of claimant. A worksheet for settlement was made part of the record as were the medical records of Dr. Koprivica and a statement regarding attorney fees. The worksheet for settlement contained the following language:

Basis of Settlement:

(1.) Compromise

\$10,967.60 on a strict compromise of the following issues:

Strict compromise of all issues. Settlement represents a 10% permanent partial impairment to the right arm and a 7.5% permanent partial impairment to the left with medical remaining open. In the event claimant believes further medical treatment is necessary, it is understood that claimant shall contact the appropriate claims representative to obtain prior approval for treatment. Treatment obtained without prior approval from the appropriate claims representative or obtained without order by the Director, shall be denied and shall be considered the responsibility of the claimant. Settlement further settles all claims for past, present and future compensation; vocational rehabilitation benefits; review and modification and/or appeal of award and any other rights and benefits claimant may have under the Kansas Workers' Compensation Act.³

On June 17, 2011, claimant filed an Application for Post Award Medical seeking medical treatment for abdominal pain. On June 24, 2011, claimant filed an Application for Review and Modification seeking additional periods of temporary total disability. At the August 4, 2011, post-award hearing claimant sought medical treatment through his personal family physician, Dr. Dan Severa, for abdominal pain and TTD benefits beginning April 20, 2011.

Claimant began noticing the abdominal complaints a few days after the accident. He complained to Drs. Chris D. Fevurly, P. Brent Koprivica and Severa. After claimant settled his claim, he had more abdominal problems. Because he had abdominal pain, claimant returned to see Dr. Severa on April 28, 2011. Claimant discontinued working on April 20, 2011, because of the pain. On April 28, 2011, Dr. Severa drafted a note indicating claimant was unable to work from April 20 to April 28, 2011, due to lower abdominal pain. On May 9, 2011, Dr. Severa wrote another note indicating claimant's time

² S.H. Trans. at 5.

³ *Id.*, Worksheet for Settlement.

off work depended on the surgeon's findings and ultrasound results. Dr. Severa's two notes were the only post-settlement medical records entered into evidence at the post-award hearing. Dr. Severa recommended that claimant consult with a surgeon, but claimant has been unable to see the surgeon.

At the post-award hearing respondent opposed claimant's request for medical treatment. Respondent's counsel also objected to the ALJ's decision to award claimant TTD benefits. The following discourse between the ALJ and counsel took place:

MR. WIMMER: Judge, I think -- and maybe this can clarify this. I don't believe that this matter was settled on a full running award, I think it was only settled on with medical left open.

JUDGE AVERY: Well, that's true, but temporary total will be pursuant to the medical. I mean, that goes along with medical care. Review and modification wouldn't be appropriate but temporary total is a part of medical care.

MR. WIMMER: I'm not sure that I agree with that, Judge.

MR. O'CONNOR: Your Honor, I don't remember.

JUDGE AVERY: Well, I think he's right because it says, "All issues except for medical care."

MR. O'CONNOR: Correct.

JUDGE AVERY: "The proposed settlement is a lump sum today in the amount of \$10,967.60 and is to be a strict compromise of all issues except open medical." And I guess you could interpret that in a number of ways, but obviously temporary total disability is paid as a result of the need for medical care.⁴

The ALJ then set terminal dates of September 5, 2011, for claimant and October 5, 2011, for respondent. None of the parties submitted any additional evidence.

On August 5, 2011, the ALJ issued two separate orders.⁵ An Order for Compensation granted claimant TTD benefits beginning August 4, 2011, the date of the post-award hearing. An Order Referring Claimant for Independent Medical Evaluation appointed Dr. Pratt to perform an independent medical evaluation of claimant. On September 7, 2011, respondent filed its Motion to Reconsider.

⁴ P.A.H. Trans. at 22-23.

⁵ Presumably these two orders were pursuant to the Application for Post Award Medical, as the ALJ set terminal dates in the Application for Review and Modification and those terminal dates had not yet expired.

Without holding another hearing, the ALJ then issued the September 13, 2011, Order which reversed his earlier Order for Compensation. In the September 13, 2011, Order the ALJ indicated a copy of the settlement hearing transcript and attached worksheet for settlement was not presented to him at the post-award hearing. After reviewing those documents, the ALJ stated: "The plain terms of the settlement worksheet, however, would indicate that temporary total compensation would have been included in those rights which were waived."⁶

PRINCIPLES OF LAW AND ANALYSIS

No statute in the Kansas Workers Compensation Act (Act) prescribes a procedure whereby a party may file a motion to ask an ALJ to reconsider his or her order. Nor is there a Director's rule allowing a party to file a motion for reconsideration of an ALJ's order.

In *Bannon*⁷ the Board held:

The Appeals Board rejects respondent's contentions for two reasons. First, the report of Dr. Eyster has been stipulated into evidence. A review of same indicates Dr. Eyster's opinion has in no way changed from the opinion expressed in his deposition on May 8, 1996. Second, it is noted that the Workers Compensation Act provides no procedure for an administrative law judge to reopen the record and reconsider his or her opinion once the final award has been issued. Absent a remand from the Workers Compensation Appeals Board as authorized by K.S.A. 44-551(b) or a Motion for Review and Modification under K.S.A. 44-528, there is no procedure authorizing an administrative law judge to reconsider his or her award. As such the Administrative Law Judge's denial of respondent's Motion for Reconsideration and to Reopen the Record is affirmed.

K.S.A. 2010 Supp. 44-551(i)(1) provides that "[a]ll final orders, awards, modifications of awards, or preliminary awards under K.S.A. 44-534a and amendments thereto made by an administrative law judge shall be subject to review by the board upon written request of any interested party within 10 days. Intermediate Saturdays, Sundays and legal holidays shall be excluded in the time computation." Respondent's motion for reconsideration was filed more than 10 days after the ALJ's August 5, 2011, Order for Compensation. Even if under the Act a motion to reconsider would be permissible, respondent's motion was not timely filed. Respondent's proper course of action was to appeal the August 5, 2011, Order for Compensation to the Board. Instead, respondent chose to file its Motion to Reconsider which is not authorized by the Kansas Workers Compensation Act. Furthermore, an appeal from the ALJ's Order for Compensation was not timely filed.

⁶ ALJ Order (Sept. 13, 2011) at 1.

⁷ *Bannon v. Liggett Group*, No. 198,280, 1997 WL 310403 (Kan. WCAB May 29, 1997).

CONCLUSIONS

The ALJ was without jurisdiction to enter the September 13, 2011, Order. Respondent failed to timely appeal the Order Referring Claimant for Independent Medical Evaluation and Order for Compensation issued by the ALJ on August 5, 2011. Therefore, the Board concludes those orders remain in full force and effect.

WHEREFORE, the Board vacates the September 13, 2011, Order entered by ALJ Avery. The August 5, 2011, Order Referring Claimant for Independent Medical Evaluation and the Order for Compensation remain in full force and effect, as neither of those orders was appealed.

IT IS SO ORDERED.

Dated this ____ day of December, 2011.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: John G. O'Connor, Attorney for Claimant
Heather A. Howard, Attorney for Respondent and its Insurance Carrier
Brad E. Avery, Administrative Law Judge